

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION**

WILLIAM WHELEHAN,

Plaintiff,

v.

THE CITY OF CHICAGO, *et al.*,

Defendants.

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Hon. Kathleen M. Pantle

ORDER

This matter comes to be heard on administrative review. Plaintiff William Whelehan seeks reversal of the Chicago Police Board's decision to terminate his employment as a Chicago Police Officer on the grounds that the decision is against the manifest weight of the evidence and, assuming *arguendo* that the decision is not against the manifest weight of the evidence, the sanction of termination is arbitrary, capricious, and unrelated to the needs of the Chicago Police Department.

Whelehan was charged with the following:

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.

Rule 6: Disobedience of an order or directive, whether written or oral.

Rule 8: Disrespect to or maltreatment of any person, while on or off duty.

Rule 9: Engaging in any unjustified verbal or physical altercation with any person, while on or off duty.

Rule 14: Making a false report, written or oral.

Rule 38: Unlawful or unnecessary use or display of a weapon.

The charges arose from an incident that occurred on or about November 22, 2009 when Whelehan was off duty. The Superintendent adduced the following evidence.

Whelehan was walking his dog, a chocolate Labrador retriever, and his dog urinated on a freshly planted plant located on property owned by Kenneth James, a man who is originally from the Caribbean. James asked Whelehan not to allow his dog to urinate on the plant again. James was concerned about the plant because it was an expensive plant that had just been planted by James' mother-in-law and James was concerned that the urination would dry out the plant. Whelehan responded "whatever" and continued to walk. James was concerned about Whelehan's response so when he entered his house he watched the side of his house on surveillance cameras that he had previously installed.

James observed a bag being thrown at the side of his house. He also saw Whelehan walk away and put his hand in his pocket. When James went outside he discovered that the opened bag contained dog feces. He screamed at Whelehan that he had forgot something, but Whelehan continued to walk and turned right on Nagle. James then picked up the bag, got into his car and pursued Whelehan.

When James caught up to Whelehan he pulled his car over to the side and threw the bag near Whelehan. He told Whelehan that Whelehan was disrespectful and that there was a place for people like him. James continued to ramble. Whelehan then responded by using a racial slur. Specifically, he told James to "Go about your business, n-----." Whelehan continued to use the same racial slur and James became somewhat angry. He used some profanities and then got out of his car.

When he got out of his car, he asked Whelehan "What did you say?" and approached Whelehan. He did not get close to Whelehan because he was afraid of Whelehan's dog. James' hands were at his side, extended outward. James then saw Whelehan pull out a gun and point it at James. James had no weapon. At no time did Whelehan identify himself as a

police officer or show James his badge. James moved around to the side of his car and asked his neighbors to call the police.

A neighbor, Christine Medunycia, who was inside her house, heard yelling and saw James approach Whelehan with his hands extended outward, hands out and palms out, as if gesturing to say "what are you doing". She could not hear any words that were being said. She did not see a badge or anything that would indicate that Whelehan was a police officer. When she saw Whelehan pull out his gun and point it at James, she shouted at Whelehan from her front door area that she was going to call 911.

Other neighbors were present also. Jannette Duenas and Emanuel Atkinson were returning home from a movie with their two-year old son. While they were sitting in their car in front of their home, they saw James' car pull up and park. James threw a while grocery bag at Whelehan and said "I think this belongs to you." The men started exchanging words and Duenas heard Whelehan say "F--- you, n-----." Atkinson heard the argument, but did not remember any specific words. Both Duenas and Atkinson saw James get out of the car and say, "What did you say? What did you say?" Atkinson observed James walking towards Whelehan with his hands outstretched and up in the air. Both Atkinson and Duenas saw Whelehan pull a gun and point it at James and tell him to get down. Duenas saw James go behind his car and put his hands in the air and say, "I have no weapons. Don't shoot." When Duenas heard Medunycia say that she was going to call the police she grabbed her son and brought him into the house. Duenas also called the police.

Whelehan called the police after Medunycia yelled that she was calling 911. After the police arrived, they searched James and his car, but did not find any guns or other

weapons. It was not until after the police arrived that Duenas and Atkinson learned that Whelehan was a police officer.

Whelehan testified in his own behalf. He was walking his dog in the vicinity of 5357 North Natchez on the evening of November 22, 2009. His dog did not urinate at that location and he was not asked by the owner of the property not to allow his dog to urinate on a bush. He did clean up some of his dog feces and put them in a bag, but accidentally dropped the bag on Balmoral.

While he was walking his dog on Nagle, James drove up in his car and threw a bag containing dog feces at him. James started yelling and pointing his finger stating, "If I ever see you by my house again, I'll put a bullet in your ass." James repeated the statement at which point Whelehan called James an "a---h---." James continued to yell profanities at him while Whelehan continued to walk southbound on Nagle. James got out of his car and moved towards the front of his car. Whelehan saw James bend down to his "ankle ground area". At that point, Whelehan drew his revolver, pulled out his police badge, and announced that he was the police.

Whelehan commanded James to get down on the ground, but James started laughing at him and smiling. James started to act like a boxer in the ring by circling around Whelehan with his fists clenched.

Whelehan told the responding officers that James had approached him in a threatening manner and reached towards his ankle as if reaching for a gun. No one was arrested that evening.

Later that evening, Whelehan completed a Tactical Response Report in which he stated that James posed an imminent threat of battery. He also filed an officer's battery

report that stated that James posed a verbal threat to him. Whelehan told IPRA that James threatened to shoot him; that James had made a furtive movement toward his ankle as if he had a weapon; that James circled him with his fists closed in a menacing manner; that Whelehan had announced his office prior to displaying his weapon; that he did not encounter James prior to James approaching him in his car; and that he did not call James a "n-----."

The Police Board unanimously found the testimony of James and the civilian witnesses credible and found Whelehan's testimony incredible. The Police Board found Whelehan guilty of all the charges. The Police Board also found that "[Whelehan] must be discharged from his position due to the dangerous and offensive nature of the conduct of which it has found him guilty...". The Police Board found that Whelehan's conduct was sufficiently serious to constitute a substantial shortcoming that renders his continuance in his office detrimental to the discipline and efficiency of the service of the Chicago Police Department, and is something which the law recognizes as good cause for his no longer occupying his office.

The Administrative Review Law provides for judicial review of all questions of fact and law presented by the entire record. *Lyon v. Department of Child and Family Servs.*, 209 Ill. 2d 264, 271 (2004); 735 ILCS 5/3-101 (2009). During an administrative hearing, the ALJ acts as a fact finder, hearing testimony, determining the credibility of witnesses, and drawing reasonable inferences from the evidence. *Gaston v. CHAC, Inc.*, 375 Ill. App. 3d 16, 23 (1st Dist. 2007). The Administrative Review Law mandates that the "findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." *Abrahamson v. Illinois Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88 (1972)

(citing 735 ILCS 5/3-110 (2009)). An administrative agency's findings of fact are not reversed unless they are against the manifest weight of the evidence. *Lyon*, 209 Ill. 2d at 271. A finding is against the manifest weight of the evidence if "the opposite conclusion is clearly evident" or where it is "unreasonable, arbitrary, and not based upon any of the evidence." *Id.* (quoting *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003)). The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings. *Abrahamson*, 153 Ill. 2d at 88. If the record contains evidence to support the agency's decision, it should be affirmed. *Id.*

As stated above, Whelehan challenges the finding of the Police Board and argues that it is against the manifest weight of the evidence. In his opening Brief Whelehan recites what he contends is uncontested evidence. The Superintendent, however, correctly points out that the evidence was disputed.

The findings of the Police Board were not against the manifest weight of the evidence. James' testimony was corroborated by other witnesses. Though Whelehan contends that James' testimony that Whelehan called him a n----- six times was not corroborated (thereby rendering James' testimony incredible) because only Duenas heard the racial slur used by Whelehan only once, Whelehan's contention is without merit. Duenas heard Whelehan use that racial slur even though Whelehan claims he never said it. The fact that she did not hear Whelehan use the slur numerous times is a minor inconsistency. Duenas and Atkinson also heard James say "What did you say?" in response to what Whelehan had said. This statement they heard also corroborates James' testimony.

James' testimony was corroborated in other important respects. Duenas and Atkinson did hear an argument between the two men, but could not recall exactly what was

said, thereby corroborating James' testimony that there was an argument and contradicting Whelehan's testimony that he was a victim of an aggressor. More importantly, Duenas and Atkinson did not see James circle Whelehan with clenched fists; they saw him with his arms extended with open palms. They also never heard Whelehan identify himself as a police officer nor did they see him pull out his badge. Medunycia also did not hear or see Whelehan identify himself as a police officer. Any inconsistencies pointed out by Whelehan are minor and do not warrant reversal of the Police Board's decision.

James' testimony was also corroborated by the testimony of IPRA Investigator Thomas Kalantzis. Kalantzis went to James' home on December 2, 2009 where he viewed the video. Kalantzis saw a male walking a dog and the dog stopped and appeared to urinate on a bush. James said something to the male who continued to walk westbound. James entered the home, and within a few minutes, the male with the dog returned, walking in an eastbound direction toward Nagle and holding a white plastic bag in his hand. The male flicked the bag onto James' doorway. James left his house, got into his car, and drove eastbound towards Nagle.

Though this video was not preserved, the failure to preserve the video is not fatal to the Superintendent's case. The Superintendent presented testimony, which the Police Board accepted as credible, that by the time James figured out how to copy it, the time had elapsed and the footage was not available because the tape had been rewritten. In any event, the Police Board was aware that the tape had not been preserved and could take that into account when deciding the case. This is not a situation where the tape captured the entire incident; the tape only pertained to a small part of the case, i.e. the start of the

dispute. It had nothing to do with Whelehan's action of pulling his gun or making false reports.

Additionally, the videotape was never within the Superintendent's or IPRA's control. It belonged to James, who did not know how to copy it so James could not give a copy to Kalantzis on December 2, 2009. By the time James learned how to copy the tape, it had been written over.

In some respects, Whelehan's testimony makes no sense. He claimed that James made a movement towards his ankle which led Whelehan to believe that James was going for a gun in an ankle holster. James, however, was searched and no gun or weapon was found on him or in his car. There would be no point in James reaching down to his ankle unless he had a gun in a holster. It is apparent that this movement was contrived by Whelehan to justify his improper behavior of pulling a gun and pointing it at James.

Additionally, no witness corroborated Whelehan's testimony. No one heard James threaten to "put a bullet" in Whelehan; no one saw Whelehan pull out his badge or heard him announce his office; no one saw James circle around Whelehan like he was a boxer; and no one saw James laughing and smiling after Whelehan pulled his gun.

Whelehan asks this Court for an adverse influence against the Superintendent because the Superintendent did not call as witnesses James' wife, Police Officer Darlene Alexander, and Police Captain Edward Lenti (who decided not to approve any charges against James). However, none of these witnesses were witnesses to the alleged misconduct. James' wife did not observe the incidents; Officer Alexander did not interview Whelehan and therefore was not a witness to any alleged false statements; and Captain

Lenti's decision not to charge James does not have a tendency to prove or disprove any of the charges against Whelehan.

Whelehan also claims that the Superintendent failed to preserve another videotape, this one from a camera at 5326 North Nagle. Though there is evidence that a camera is at that location, there is no evidence, however, that a tape existed from that camera. In any event, there is no evidence that the Superintendent ever controlled the camera or any tape from it.

In short, Whelehan is asking the Court to reweigh the evidence. However, it is neither the Court's duty nor prerogative to reweigh the evidence. "Where credibility or conflicting testimony is at issue, the decision of the Board must be sustained." *Yeksigian v. City of Chicago*, 231 Ill. App.3d 307, 311 (1st Dist. 1992). Moreover, there was sufficient evidence adduced to support each of the charges.

Whelehan also challenges the Police Board's decision to discharge him. Cause for discharge is defined as "some substantial shortcoming which renders an employee's continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his discharge." *Fantozzi v. Board of Fire & Police Comm'rs*, 27 Ill.2d 357, 360 (1963). A board's "cause" finding should be respected by a court and it should be overturned only if it is arbitrary and unreasonable or unrelated to the requirements of the service. *Launius v. The Board of Fire and Police Comm'rs of the City of Des Plaines*, 151 Ill.2d 419, 435 (1992) (internal quotation marks omitted).

The Police Board's "cause" finding was not arbitrary and unreasonable nor was it unrelated to the requirements of service. The testimony from four civilians showed that

they were upset and angry about the events, specifically, about the way Whelehan was acting. Whelehan's actions undermined public confidence in police officers. Whelehan used a racial slur to denigrate and insult a Chicago citizen who he is sworn to uphold and protect. He pulled his gun and pointed it at an unarmed man who was committing no crime. It is certainly reasonable to conclude based on Whelehan's actions that he cannot be trusted to make reasonable decisions as a police officer.

To compound matters, Whelehan was found guilty of making false statements. This is not a situation where a police officer recognized that he or she may have overreacted to a set of circumstances and accepted blame. Instead, Whelehan immediately began lying once the responding officers were on the scene and continued with the lies throughout the course of the IPRA investigation.

Whelehan points out that he adduced favorable testimony from other officers with whom he worked and that he had received 33 complimentary awards from the Chicago Police Board. The Police Board, however, was aware of Whelehan's history and heard the testimony of the witnesses.

Whelehan also has attached records from unrelated proceedings to his materials. However, these materials were not part of the administrative record and therefore the Court cannot consider them.

The decision of the Police Board is affirmed.

This is a final Order disposing of all litigation in this matter.

DATE: August 14, 2012

